

Signal Transformer Co., Inc. and Local 431, International Union of Electrical, Radio and Machine Workers, AFL-CIO and Local 810, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Party to the Contract

Local 810, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Local 431, International Union of Electrical, Radio and Machine Workers, AFL-CIO and Signal Transformer Co., Inc., Party to the Contract

Signal Transformer Co., Inc. and Sol Bogen, as Attorney on behalf of various Employees and Local 431, International Union of Electrical Radio and Machine Workers, AFL-CIO, Party in Interest. Cases 29-CA-6781, 29-CA-6844, 29-CB-3564, and 29-CA-7091

October 29, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND
MEMBERS FANNING AND HUNTER

On April 15, 1980, Administrative Law Judge Edwin H. Bennett issued the attached Decision in this proceeding. Thereafter, Respondent Local 810, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereafter the Teamsters) filed exceptions and a supporting brief; the General Counsel filed cross-exceptions; and Charging Party Local 431, International Union of Electrical, Radio and Machine Workers, AFL-CIO (hereafter the IUE), filed cross-exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified below.

The facts of this case are as follows: The IUE was the collective-bargaining representative of a unit of production and maintenance employees at Respondent Signal Transformer Co., Inc. (hereafter Signal), from 1962 until 1978, when the events which gave rise to this proceeding occurred.¹ In September the parties met and commenced collective-bargaining negotiations for a new contract. They thereafter had three meetings at which, after give and take, they reached agreement on a

number of items. On October 16 they met again and Signal presented its final package, which it had assembled with the assistance of a Federal mediator. The Union's bargaining committee, headed by Business Agent Pedro Colon, agreed to recommend the package to the rank and file. The committee then met with the employees who voted overwhelmingly to reject the agreement and to strike. The employees insisted on a 2-year contract with a 50-cent-per-hour increase each year. Picketing began the following morning, and continued throughout that week.

On October 20 the parties met again at a negotiating session arranged for, and attended by, the mediator. The session began around 4 p.m. and ended at or about 9:30 p.m. Throughout the session, the union committee demanded the same terms insisted on by the employees, a 2-year contract with a 50-cent-an-hour increase each year. Respondent, through its President Edward Polen and its attorneys J. William Rosenbluth and Lawrence Rosenbluth, insisted that it could not afford this agreement. At one point Polen walked out and left the attorneys to negotiate. He returned shortly thereafter and recommended bargaining. Out of the presence of the Union, the mediator suggested to Polen that he make a compromise offer on wages. Because the employees had rejected the tentative agreement by such a wide margin, Polen told the mediator that he doubted the IUE's ability to sell the offer, and that it was useless dealing with them because it was a nonrepresentative group. Neither side ever moved from its final proposal and the IUE never requested another meeting or submitted a new proposal.

Following the October 20 meeting, the strike continued. Signal's employees, led by Hector Santiago, became increasingly dissatisfied with the IUE. On October 23, they voted to remove Colon as their representative, and Santiago informed Colon. Santiago then contacted the Teamsters and arranged for its representatives to visit the plant, which they did on that day and the following one. They met with employees and obtained authorization cards. This activity was observed by both Polen and Colon.

The Administrative Law Judge found that on the morning of October 24 all picketing by, or on behalf of, the IUE terminated. From that date until the end of the strike on November 4, the only picketing was by, and on behalf of, the Teamsters. On October 23 the Teamsters filed a representation petition which was supported by 73 authorization cards in a production and maintenance unit consisting at that time of 121 employees. After October

¹ Unless otherwise noted, all dates hereinafter are in 1978.

26, representatives of the IUE did not appear at the plant.

On November 4, Polen and Rosenbluth met with representatives of the Teamsters. Polen examined the authorization cards and then signed a recognition agreement. The agreement provided that recognition was extended based on the following objective considerations: (1) the cessation of picketing by the IUE; (2) the picketing by a substantial number of employees for the Teamsters; (3) employee statements to Respondent Signal stating their desire for Teamsters representation; (4) petitions attached to the recognition agreement whereby 124 employees revoked their support for IUE representation; and (5) Teamsters authorization cards signed by 118 of the 130 unit employees also submitted to Signal with the recognition agreement. The parties then negotiated a collective-bargaining agreement. The meeting began at 9:30 a.m. and ended at 7 p.m. when they reached agreement on a 3-year contract. On Monday, November 6, the employees returned to work.

On November 21, the Teamsters withdrew its demand to represent Signal's employees and rescinded the collective-bargaining agreement, "as a result of a specific directive from [the] Teamster General President. . . ." A few days later the Teamsters representation petition was withdrawn. Signal thereafter refunded to the employees all dues it had deducted, and it made no contributions to any of the Teamsters funds.

As of October 16, the day that Signal's contract with the IUE expired, Signal ceased payments to the various IUE health, welfare, and pension funds. In January 1979, Signal instituted its own health plan through Blue Cross and Blue Shield.

Based on these facts, the Administrative Law Judge found that Respondent, by its conduct on October 20, did not violate Section 8(a)(5) of the Act by refusing to bargain with the IUE. He also found that Signal did not violate Section 8(a)(5) of the Act when it withdrew recognition from the IUE on November 4, and thereafter made unilateral changes in its employees' terms and conditions of employment. Thus, he found that, on the date Signal recognized the Teamsters, Signal had clear and convincing evidence, based on objective considerations, to support a good-faith doubt concerning the IUE's continuing majority status.

On the other hand, the Administrative Law Judge found that Signal violated Section 8(a)(1) and (2) by assisting and recognizing the Teamsters at a time when the incumbent union had not abandoned its claim to represent Signal's employees, and that it violated Section 8(a)(1) and (3) by ex-

ecuting a contract containing a union-security clause.

The General Counsel and the IUE except to the Administrative Law Judge's failure to find that Signal violated Section 8(a)(5) of the Act by its conduct on October 20, for the same reasons which they urged to the Administrative Law Judge. In addition, the General Counsel excepted to the Administrative Law Judge's finding that Signal lawfully withdrew recognition from the IUE on November 4. Finally, the Teamsters except to the finding that it violated Section 8(b)(1)(A) and (2) of the Act by accepting recognition and signing a collective-bargaining agreement with Signal while the IUE still claimed to represent Signal's employees, and the Teamsters representation petition was pending before the Board. After carefully reviewing the record and the findings of the Administrative Law Judge, we have decided to adopt his conclusions, for the reasons stated below.

With respect to the events of October 20, the General Counsel and the IUE argue that when Polen walked out during bargaining and made the statements to the mediator, as set out above, he, in effect, withdrew recognition from the IUE. The Administrative Law Judge, however, disagreed. He found that Polen was "understandably . . . angered and upset over the employees' failure to ratify a contract which resulted from genuine good-faith bargaining involving many economic concessions on his part," and that the walkout was nothing more than an outburst, born of frustration. In any event, he found that the Rosenbluths continued negotiating in Polen's absence, and that Polen returned to the discussions shortly thereafter. Finally, Polen's conduct had to be considered in the context of "the long history of peaceful bargaining relations."

With respect to Polen's statements to the mediator, the Administrative Law Judge found that they were a response to the mediator's suggestion that Polen make a compromise offer, and that a reasonable construction of Polen's remarks was that "a new offer without a prior assurance that it had a reasonable chance of acceptance was an exercise in futility." His conclusions, with respect to the walkout and the remarks, were further bolstered by the conduct of both the mediator and Colon, neither of whom reacted to Polen's remarks in a manner which suggested that they believed Respondent had withdrawn recognition. Nor did the IUE alter its picket signs thereafter. Thus, he concluded that neither the walkout nor the statements constituted a withdrawal of recognition.

As noted before, the Administrative Law Judge also found that Signal violated Section 8(a)(1), (2),

and (3), and the Teamsters violated Section 8(b)(1)(A) and (2) of the Act when it entered into a recognition agreement and a collective-bargaining agreement containing a union-security clause. With regard to these violations, the Administrative Law Judge found that the Teamsters October 24 representation petition raised a question concerning representation. He further found that, at the time Signal recognized the Teamsters, the IUE still had a representation claim. He concluded that, under the *Midwest Piping* doctrine,² the claims of the incumbent and the outside union must be resolved at a Board-conducted election, and that therefore Signal's recognition of the Teamsters was unlawful.

Since the issuance of the Administrative Law Judge's Decision, the Board has reconsidered and modified the *Midwest Piping* doctrine as it applies to rival unions in the context of initial organizing, and to an incumbent union which is challenged by an outside union.³ In *RCA del Caribe*, the Board held that normally an employer must continue to bargain with the incumbent union during the processing of the petition by the outside union. The Board specifically noted, however, that "this rule will not preclude an employer from withdrawing recognition in good faith based on other objective considerations."⁴ In the instant case, as noted earlier, the Administrative Law Judge found that Signal had a sufficient basis for withdrawing recognition, including, *inter alia*, petitions from its employees whereby 124 employees, out of a unit of approximately 130, indicated they no longer desired IUE representation. We agree with the Administrative Law Judge that the evidence available to Signal, particularly the employee petition, supported a good-faith doubt as to the IUE's continuing majority status. Accordingly, we adopt his finding in this regard.⁵

We also adopt his finding that on November 4 Signal was not free to recognize the Teamsters, and that by executing a recognition agreement and a collective-bargaining agreement, Signal violated Section 8(a)(1), (2), and (3), and the Teamsters violated Section 8(b)(1)(A) and (2) of the Act. Thus, in *Bruckner Nursing Home*, *supra*, the companion case to *RCA del Caribe*, we held that where there

were two unions with competing claims an employer, "once notified of a valid petition, . . . must refrain from recognizing any of the rival unions."⁶ In the instant case, the Administrative Law Judge found that, even though the IUE had lost its majority status, it still had not abandoned its claim to represent Signal's employees. Therefore, as of October 24, when the Teamsters filed its petition, Signal could not extend recognition to it, pending resolution of the question concerning representation. We therefore adopt the Administrative Law Judge's findings of the violation for the reasons set out above.⁷

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that Respondent Signal Transformer Co., Inc., Inwood, New York, its officers, agents, successors, and assigns, and Respondent Local 810, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, agents, and representatives, shall take the action set forth in said recommended Order, as so modified:

1. Substitute the following for paragraph A, 1(c):
 "(c) Discriminating in regard to hire and tenure and terms and conditions of employment of its employees, thereby encouraging membership in one labor organization and discouraging membership in another."
2. Substitute the following for paragraph B, 1(c):
 "(c) Causing or attempting to cause Respondent Employer to discriminate in violation of Section 8(a)(3) of the Act."
3. Substitute the attached notices for those of the Administrative Law Judge.

⁶ 262 NLRB 955. (Emphasis supplied.)

⁷ We note that the Administrative Law Judge inadvertently failed to provide the appropriate remedy for Signal's violation of Sec. 8(a)(3) and the Teamsters violation of Sec. 8(b)(2). We shall modify the Decision to provide the appropriate cease-and-desist remedy in the Order and notice.

APPENDIX A

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board having found, after a hearing, that we violated Federal law by granting recognition to Local 810, International Brotherhood of Teamsters, Chauffeurs, Warehouse-

² *Midwest Piping and Supply Co., Inc.*, 63 NLRB 1060 (1945).

³ *Abraham Grossman d/b/a Bruckner Nursing Home*, 262 NLRB 955 (1982) (Member Jenkins concurring); *RCA del Caribe, Inc.*, 262 NLRB 963 (1982) (Chairman Van de Water and Member Jenkins dissenting separately).

⁴ 262 NLRB 963, fn. 13.

⁵ Chairman Van de Water dissented in *RCA del Caribe*. He believes that an employer, when a rival union has filed a representation petition, must cease bargaining with the incumbent union until the question concerning representation has been resolved. He agrees, however, that an employer may withdraw recognition from the incumbent when, as here, Respondent Signal had a good-faith doubt as to the IUE's continuing majority status.

men and Helpers of America, at a time when a question concerning representation existed, we hereby notify you that:

WE WILL NOT assist or contribute support to Local 810, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, by recognizing, or contracting with, such labor organization as the exclusive representative of our employees for the purpose of collective bargaining at a time when there exists a question concerning representation.

WE WILL NOT give effect to our November 4, 1978, agreement with Local 810, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or to any renewal, extension, modification, or supplement thereof, unless and until said labor organization has been duly certified by the National Labor Relations Board as the exclusive representative of our employees, but nothing herein shall be construed to require that we vary or abandon any existing term or condition of employment.

WE WILL NOT discriminate in regard to hire and tenure and terms and conditions of employment of our employees, thereby encouraging membership in one labor organization and discouraging membership in another.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL withdraw and withhold all recognition from Local 810, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the collective-bargaining representative of our employees unless and until said labor organization has been certified by the National Labor Relations Board.

SIGNAL TRANSFORMER CO., INC.

APPENDIX B

NOTICE TO MEMBERS AND EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board having found, after a hearing, that we violated Federal law by accepting recognition from Signal Transformer Co., Inc., at a time when a question concerning representation existed, we hereby notify you that:

WE WILL NOT accept recognition as the representative of that Employer's employees or enter into a contract with the Employer as the exclusive representative of its employees at a time when there exists a question concerning representation.

WE WILL NOT give effect to our contract of November 4, 1978, with the Employer, or to any renewal, extension, or supplement thereof, unless or until we have been duly certified by the National Labor Relations Board as the exclusive representative of such employees.

WE WILL NOT cause or attempt to cause the Employer to discriminate in violation of Section 8(a)(3) of the Act.

WE WILL NOT in any like or related manner restrain or coerce employees of the above-named Company in the exercise of the rights guaranteed them in Section 7 of the Act.

LOCAL 810, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION

STATEMENT OF THE CASE

EDWIN H. BENNETT, Administrative Law Judge: This consolidated proceeding was heard on October 9, 10, 17, 25, and 26, 1979, in Brooklyn, New York, upon charges filed by Local 431, International Union of Electrical, Radio and Machine Workers, AFL-CIO, herein called IUE or Local 431, in Cases 29-CA-6781, 29-CA-6844, and 29-CB-3564, on November 8 and 20, and December 6, 1978, respectively; upon a charge filed in Case 29-CA-7091 by Sol Bogen, an attorney acting for and on behalf of certain employees, on March 23, 1979; upon a complaint in this last case which issued on April 26, 1979; upon a consolidated complaint which issued on November 29, 1978, on the charges filed by IUE; and upon an order further consolidating cases issued on May 23, 1979, which, *inter alia*, consolidated all of the foregoing cases.

The consolidated complaint alleges, *inter alia*, that Signal Transformer Co., Inc., herein called the Employer or Signal, violated Section 8(a)(1) and (5) of the National Labor Relations Act by negotiating in bad faith with, and withdrawing recognition from, IUE on October 20, 1978, and thereafter by unilaterally changing terms and conditions of employment of IUE represented employees. It further alleges that the Employer violated Section 8(a)(1), (2), and (3) of the Act by entering into and enforcing a collective-bargaining agreement containing a union-security clause with Local 810, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called Teamsters or Local 810. This very same conduct also is alleged to constitute 8(b)(1)(A) and (2) violations on the part of

Teamsters. In addition, the aforesaid unilateral conduct by the Employer also is alleged to constitute violations of Section 8(a)(1), (2), and (3) of the Act.

The complaint in Case 29-CA-7091 alleges, *inter alia*, that certain of the aforesaid unilateral changes, i.e., the termination of contributions to IUE's pension, health, and insurance funds, as well as the granting of other medical benefits on December 1, 1978, were for the purpose of discouraging employee support for IUE and thus violated Section 8(a)(3) of the Act.

With respect to all of the refusal to bargain allegations, it was conceded on the record by the General Counsel, that the linchpin to this part of the case is the allegation of 8(a)(5) violations occurring on October 20, 1978, because otherwise the presence of the Teamsters would have raised a real question concerning representation thus mandating a neutral posture by the Employer and requiring that it cease recognition of IUE. In this regard, however, the General Counsel would still press for violations of Section 8(a)(1), (2), and (3) flowing from the recognition accorded the Teamsters, as well as the counterpart 8(b)(1)(A) and (2) violations.

For their part, the Employer and Teamsters deny any wrongdoing. While they freely admit the execution of a collective-bargaining agreement, which subsequently was rescinded, it is their contention that Teamsters was the freely chosen majority representative thus privileging its recognition and rendering lawful all subsequent changes made in employees' terms and conditions of employment. In addition, Teamsters contends that it was granted recognition in a context free of any rival claim by IUE because that Union had abandoned the employees prior thereto. Finally, the Employer argues that in the circumstance of this case no financial liability should attach to it by way of remedy to any violation that may be found.

Upon the entire record, including my observation of the demeanor of the witnesses, and after consideration of briefs,¹ I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Employer's sole place of business is a plant in the Town of Inwood, County of Nassau, New York, where it manufactures transformers and related products. It annually sells and ships products valued in excess of \$50,000 directly to customers located outside the State of New York. All parties admit, and I find, that Signal is an Employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that IUE and Teamsters are labor organizations within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Refusal To Bargain on October 20, 1978*

Local 431 became the recognized collective-bargaining representative of all Signal employees except for office

¹ IUE and Teamsters filed helpful briefs and the Employer a letter in lieu of a brief. The General Counsel did not file a brief but rather articulated his position on certain matters at various times in the record.

workers, engineers, guards, and supervisors (essentially a production and maintenance unit) about 1962, from which time on the parties entered into a series of collective-bargaining agreements, the most recent of which was for the period 1975 to October 16, 1978.² About 1977 Signal moved to its present location and the bargaining unit expanded from about 35 employees to the approximately 130 employees at the time of the contract expiration in 1978.

Negotiations for a new contract commenced on September 23, IUE's negotiating group was headed by Pedro Colon, a business agent who had serviced the shop since 1974, and a committee of three employees including Hector Santiago. The Employer's negotiating group consisted of its President Edward Polen and its attorney Lawrence Rosenbluth. Additional meetings were held on October 6, 10, 13, and 16, at which, the General Counsel and IUE concede the Employer met in full its statutory obligation to bargain in good faith. According to the testimony of Colon and Polen, which does not differ in any meaningful way, following a series of concessions and genuine give-and-take, the Employer, on October 16, 1978, offered a 3-year contract providing for annual wage increases in the first 2 years of 35 cents and 30 cents, with the last year of the contract providing for 25 cents the first 6 months and an additional 75 cents for the last 6 months. The offer also included additional fringe benefits (optical plan and a major medical plan) valued at \$7.30 per month for each employee, and a 10-cent uniform allowance. Under the proposed contract, an employee's hourly wage would have risen to \$4.975. This package was assembled with the aid of a Federal mediator who opined that it would settle the contract after the Employer had advised the IUE committee that the economics of the Company were such that it was the best offer obtainable and beyond its budget. The IUE in no way challenged the Employer's economic explanations but rather appears to have accepted them, for the committee agreed to recommend acceptance by the rank-and-file. Colon immediately convened an employee meeting in the shop which began about 4:15 p.m. and was attended by about 130 employees.

According to Colon, whose testimony I credit, the meeting lasted about 2 hours during which time numerous employees and Colon spoke about the contract.³ Colon explained the difficult bargaining that had taken place and of the committee's efforts in securing Signal's offer which he then proceeded to detail. Although the record does not disclose that Colon recommended its acceptance, in so many words the sum and substance of his testimony was that he favored its acceptance rather than a strike. Despite the committee's opinion that the proposed contract was the best obtainable, more than 100 of the employees voted in favor of a strike. Employee dissatisfaction focused on two major points, first they

² Unless otherwise indicated, all dates hereinafter are in 1978.

³ Two employees, Hector Santiago and Gladys Matos, also testified regarding the meeting. For the most part, their testimony is not substantially at variance with that of Colon and what minor discrepancies do exist have no bearing on this aspect of the case. These differences however which relate to Teamsters' claim of abandonment by IUE will be considered below.

wanted a 2-year rather than 3-year agreement, and second they wanted 50 cents a year thus bringing their wage to \$5 an hour after 1 year rather than \$4.975 after 2-1/2 years.

Word of the strike vote spread quickly so that by the time Colon arrived at Polen's office to advise of the contract rejection, both the mediator and Polen knew of it. Colon informed the Employer of the employees' demand for a 50-cent raise each year of a 2-year agreement. Either Polen or his attorney responded that the Company could not afford such demand and it would have to take the strike. The meeting ended without any further attempt at negotiation. The strike, which was 100-percent effective, and picketing commenced the next morning, Tuesday, October 17, and continued throughout that week.

On October 20, 1978, at the office of the Employer, starting about 4 p.m., a negotiating session arranged for, and attended, by the mediator was conducted by the parties. Colon was present together with an enlarged committee of six employees. Representing Signal was Polen, and his attorney Rosenbluth together with Rosenbluth's father, also an attorney. As noted previously, the General Counsel relies on the events at this meeting as the foundation for all the refusal-to-bargain allegations. Both Polen and Colon testified regarding this meeting without any material contradiction between them. The IUE repeated its demand for a 2-year contract with a 50-cent-an-hour increase each year.⁴ Polen rejected these demands explaining that the Company already had extended itself beyond its financial good judgment in order to avoid a strike. He, or his lawyers, further explained that Signal's wages exceeded those paid by other employers in the immediate vicinity. At some point in the meeting, which lasted until about 9:30 p.m., Polen angrily remarked that he would fight rather than accede to IUE's demands and would walk out of the meeting leaving the matter to the two lawyers. Colon rejoined that IUE already had begun to fight, referring to the strike in progress.

Although Polen did leave his own office, Colon conceded that the lawyers remained behind and they all continued to discuss the merits of each sides' case. Colon based IUE's new demands on employees' needs for higher wages and the lawyers rejected these higher demands stating the employees should secure better jobs elsewhere if they could. Colon also made vague reference to the lawyers "talking about going out of business and all this kind of thing."⁵

Both Polen and Colon testified that each side met separately with the mediator during the course of the bar-

gaining session, but neither witness was entirely clear concerning the number of such separate meetings or at what point in the bargaining they were held. However, apparently after one such meeting between the mediator and IUE, the former suggested to Polen that the IUE committee would attempt to sell the employees on a contract containing a 40-cent-an-hour increase. Again, it is not clear whether or not this suggestion entailed a 2-year or 3-year contract. However, it is clear the mediator's suggestion was made notwithstanding that Colon had informed him, according to Colon's testimony, that "the union wouldn't come down from its demands." Ordinarily, the mediator's efforts in this regard would not enter into a case such as this; however, Polen's reply recited below is the heart and soul of the General Counsel's refusal-to-bargain case and is relied on almost exclusively as the evidentiary support of the allegation of bad-faith bargaining on October 20, 1978, as well as the claim that recognition was withdrawn that date.

Polen was examined closely about his reply from memory and from his pretrial affidavit. He testified that because the employees had rejected overwhelmingly the tentative agreement, he believed the IUE had lost their confidence and he so told the mediator. He also told the mediator that it was "useless dealing" with IUE, that it was a "nonrepresentative group," that he doubted IUE's ability to sell the offer, and there was "no point to negotiating because they didn't represent the people." None of these remarks, or any like or similar statements, were uttered in the presence of IUE negotiators or employees. Polen explained his remarks as having been prompted by the belief that it would have been fruitless to make a new offer without reasonable assurance the IUE could obtain its ratification and that, absent such assurance, IUE did not seem representative of the employees.

Polen credibly testified that the mediator then spoke to the IUE and upon his return advised that short of accepting the Union's demands there did not appear to be any offer, 40 cents or otherwise, that could reasonably guarantee a settlement of the strike. Colon credibly testified that the mediator apparently in the very same conversation, although perhaps in a later one, told him "the company's not going to give you any more because they claim you lose control over the people."⁶ Colon made no reply and at no time did he make any protest to the mediator to the effect that Signal was not bargaining in good faith.

The meeting of October 20, 1978, ended without either the IUE or the mediator seeking or arranging for further bargaining. Colon merely told the employees at the picket line that Signal had not changed its offer and they should prepare for a long strike. Neither side ever budged from their positions of October 20, and IUE never again requested another meeting or submitted a new proposal.⁷ IUE's picketing after October 20, contin-

⁴ It appears that IUE also was seeking additional dental and medical coverage but Colon's testimony in this regard is not entirely clear. In any event, it does not seem that these items were a major roadblock to agreement.

⁵ The General Counsel has not alleged a violation of the Act based upon this or any other remarks by Signal's lawyers at this or any other time. Nor did he seek to rely on it when stating his theory of the case on the record. I infer from this testimony that the lawyers, at most, may have reiterated that the Employer could not afford to increase the contract offer tentatively agreed to on October 16, 1978. Accordingly, I conclude that the quoted comment, sparse and ambiguous as it is, can provide no support whatsoever to the General Counsel's case.

⁶ Colon placed the timing of the remarks here set forth at close to 9:30 p.m. as he was on his way out.

⁷ I am mindful of the General Counsel's position that in light of Signal's recognition of Teamsters it would have been futile for IUE to request bargaining. However, as discussed below, the said recognition did not occur until November 4.

ued without any change in the picket sign legends which apparently referred only to the employees being on strike.

Conclusions Regarding the Events of October 20

The General Counsel and IUE contend that Signal's conduct on October 20, as described above, and about which there is no real controversy, amounts to an unlawful refusal to bargain. They point to Polen's remark to the effect he was walking out of the negotiations and his comments to the mediator as evidencing bad-faith bargaining and a withdrawal of recognition. I do not agree.

Polen understandably was angered and upset over the employees' failure to ratify a contract which resulted from genuine good-faith bargaining involving many economic concessions on his part. He had advised the IUE that the contract would have placed an economic strain on the Company and it could not afford further increases, a claim not challenged by IUE. Under the circumstances of this case, including the long history of peaceful bargaining relations, it would stretch to the breaking point the bargaining obligations imposed by the Act to view Polen's "walk out" as a violation. It represented no more than an outburst, born of frustration, that there would be no more concessions that day. Further, it appears that Colon did not at the time view this conduct as anything more than that. Indeed, his reaction was no different than what might be expected of any union negotiator confronted with a true deadlock, he attempted to persuade the Company further of the rightness of the Union's position by continuing discussions with the lawyers after Polen left the room. Finally, this conduct is rendered almost meaningless by the fact that shortly thereafter Polen returned to the discussions with his lawyers and the mediator.

The General Counsel also relies on Polen's quoted statements to the mediator as proof of the allegation that Signal withdrew recognition from IUE. This might be a tenable argument if the mediator had viewed Polen's statements in this light and had acted upon them by advising IUE that it no longer was recognized as the bargaining agent. However, the force of this argument is lost inasmuch as the mediator merely advised Colon that Polen would not further increase his last offer because of his belief the IUE had lost control of the employees. Thus, not only did the mediator not consider Polen's statements as a withdrawal of recognition, more importantly, there simply is no basis for IUE to have formed such a belief. Colon's sole reaction to the mediator's comments was to inform the employees to prepare for a long strike, the only purpose of which was to obtain the IUE's economic demands. Polen's remarks should not be viewed in isolation but rather in the context in which made, that is the IUE committee's failure to secure ratification of the tentative agreement on October 16, and the clearly stated position of the IUE on October 20, that it would not reduce its demands for concessions Signal believed would be economically disastrous.⁸

⁸ I accept the Employer's assertion in this regard for the simple reason that IUE did not challenge it during the negotiation or any time thereafter. Nor did IUE seek the Employer's records in justification of its position.

I find a reasonable construction of Polen's remarks was what he intended them to be; namely, that a new offer without a prior assurance that it had a reasonable chance of acceptance by the employees seemed an exercise in futility. It will be recalled that the Employer had been once burned and was unwilling to place itself in a position where it would be met with escalating demands to each new offer. It was entitled to, and did, remain pat on its last offer. The remarks in issue were not a gratuitous expression of hostility but instead were prompted by the mediator's suggestion that the Employer offer a middle ground compromise. As it turned out the Employer's fear was well grounded for the IUE also rejected the mediator's suggestion that it lower its demands. Of course there is no claim, as well there should not be, that IUE somehow acted unlawfully by adhering to its position. Yet we are asked to find the Employer's similar steadfastness a violation of law because of the language used to the mediator in explanation of the basis for its hard and fast position at a time when the parties, after good-faith bargaining, were at a deadlock over the most important items in the contract and thus at a lawful impasse. See *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967).

Nowhere in this record is there any evidence that the Employer would not have entertained new IUE proposals or that it would not itself have made a new offer upon which it would have met and negotiated further if there was a ray of hope that a compromise agreement could be reached. As noted, the parties were at impasse and to engage in futile, meaningless discussion is not a requirement of the Act. All that Polen intended by his comments was reasonable assurance that a new offer by him had a chance of employee approval. That is how the mediator apparently viewed the remarks and certainly how they were transmitted by him to Colon, who so understood them that way and in turn so informed the employees.⁹

Accordingly, I find those allegations of the consolidated complaint which allege violations of Section 8(a)(1) and (5) occurring on October 20, 1978, to be without merit and I shall recommend they be dismissed.

B. The Recognition of Teamsters

There is no dispute that on November 4, Signal recognized Teamsters and signed a collective-bargaining agreement with it containing a union-security clause. By that act, of course, Signal also withdrew its recognition of IUE and changed previously existing terms and conditions of employment. Having rejected the General Counsel's allegations of violations on October 20, the only issue with respect to the said recognition, as conceded by the General Counsel, is whether or not a violation exists premised on the Board's *Midwest Piping* doctrine¹⁰

⁹ If it is the General Counsel's position that the remarks made privately by Polen to the mediator and not transmitted to Colon should be considered apart from other circumstances, it is without merit. Even if those remarks could be construed and interpreted as a clear withdrawal of recognition, a finding I expressly reject, the General Counsel has failed to cite a single authority, and I have not found any, which would support a finding of violation based on such uncommunicated comments.

¹⁰ *Midwest Piping and Supply Co., Inc.*, 63 NLRB 1060 (1945).

Teamsters assert the facts here remove this case from the *Midwest Piping* situation, essentially because it contends that IUE abandoned the employees and was not therefore asserting a rival claim for representation at the time recognition was accorded. Moreover, Teamsters take the position that even if it can be said that a real question concerning representation existed by virtue of IUE's presence, it (Teamsters) was the majority representative and the application of *Midwest Piping* in such a situation simply is bad law and should no longer be followed. With respect to his *Midwest Piping* theory, the General Counsel neither denies nor concedes Teamsters majority status but rather contends that both unions were presenting real questions concerning representation. However, the General Counsel does take the position that if the case is viewed in the posture of a *Midwest Piping* violation, all other unrelated allegations occurring after October 20, i.e., withdrawal of recognition from IUE and unilateral actions, would be without merit.¹¹

The IUE, while emphasizing its position that Signal unlawfully refused to bargain on October 20, thus rendering irrelevant any employee support thereafter garnered by Teamsters, nevertheless acknowledges that but for such violation the case does present a situation where the *Midwest Piping* doctrine is applicable. IUE also argues, however, that no exception should be found to that doctrine based upon the purported majority status of Teamsters because employee designations for that union were coerced by threats and fraud.

To place the Teamsters position in proper perspective, I reaffirm my rulings at the hearing precluding it from establishing that it secured bargaining authorization from a majority of employees in an appropriate unit, and also barring IUE from establishing that employee designations for the Teamsters resulted from coercion or fraud. With respect to the Teamsters position, whether or not it obtained majority status is irrelevant in a *Midwest Piping* type of case. With respect to the IUE position, inasmuch as it concedes the existence of a competing claim by Teamsters the attempt to show that some authorization cards are invalid is no more relevant than the Teamsters effort to prove it had a majority. Concerning the claim that some employees were threatened with harm to sign cards, it is a claim expressly disavowed by the General Counsel and thus to allow IUE to pursue such contention would constitute an impermissible attempt by it to add allegations to the complaint which the General Counsel has refused to do. It has been long recognized that Section 3(d) of the Act rests exclusive and final authority with the General Counsel in matters concerning the issuance or refusal to issue complaints and that this administrative determination is not subject to Board

review.¹² For all of the same reasons I reject the argument renewed in IUE's brief that the Teamsters authorization cards were obtained in violation of "moral standard(s)" governing representation elections as a result of its failure to disclose "the sordid history of Local 810"¹³ (IUE's br., p. 24). Moreover, IUE could point to no authority supporting its novel claim, a somewhat surprising one for a union to make, that union authorization cards are invalid absent complete disclosure of any and all civil and criminal wrongdoings committed by the union or by its past or present officials.¹⁴

We turn then to the sequence of events, about which there is no substantial dispute, leading to Signal's recognition of Teamsters.

During the employee meeting of October 16, Colon explained the strike procedures and advised employees they would receive \$25 weekly benefits beginning with the second week of the strike. Employees Gladys Matos and Hector Santiago also recalled Colon telling them they would be on their own if they struck and Ramon Valerio recalled Colon saying they might be fired. I credit Colon's denial of these remarks.¹⁵ In any event, the entire unit of about 130 employees struck the next day and also engaged in picketing the plant. Although the number of actual pickets declined daily, there is no question but that as of the morning of October 23, the strike was 100 percent effective, IUE was the only union picketing, there were at least 10 employees on the picket line, and Colon had been actively supervising the picketing on a daily basis.

However, for reasons of their own, the employees, led by Hector Santiago, became increasingly dissatisfied with IUE. On October 23, they voted to remove Colon as their representative and Santiago informed him of their action. Finally, Santiago contacted the Teamsters and arranged for its organizers to visit the plant, which was done on the afternoon of October 23, and on the next day. They met with employees and obtained from them signed authorization cards, an activity observed by Polen and by Colon who overheard the organizers promise that Teamsters would obtain a contract and pay strike benefits. The organizers also urged the employees to cease picketing for IUE and substitute therefor Teamsters picket signs, which was done.

On the morning of October 24, all picketing by, or on behalf of, IUE terminated and from that date until the end of the strike on November 4 the only picketing conducted was by, and on behalf of, Teamsters. Colon conceded that he did not return to the plant after October 26. By all accounts, approximately 90 percent of the bar-

¹² *Times Square Stores Corporation*, 79 NLRB 361, 364-365 (1948).

¹³ IUE refers to prior unfair labor practice violations and alleged criminal conduct of Local 810 officials.

¹⁴ Although IUE does not urge adoption of such a rule in so many words, he broadly formed basis for attacking the validity of the Teamsters cards inescapably would result in its establishment should merit be found to the argument. No rational basis is advanced by IUE which would limit the rule to Local 810.

¹⁵ Colon impressed me as having a more accurate recollection of this meeting concerning a matter which he, as a union official, had greater familiarity with than any of the employees. Further, there is no reason for Colon to have made such improbable remarks particularly where, as here, he and the union actively supported the strike.

¹¹ It should be noted that, if Signal had withdrawn recognition from IUE on October 20, it would have violated Sec. 8(a)(5) of the Act inasmuch as such withdrawal would not have been based on any reasonably grounded good-faith doubt of IUE's presumptive majority status. *Barrington Plaza and Tragniew, Inc.*, 185 NLRB 962 (1970); see *Laystrom Manufacturing Co.*, 151 NLRB 1482 (1965). Signal does not assert otherwise, as well it could not, since it contends it bargained in good faith with IUE on that date. Teamsters contends that even in such situation IUE's subsequent abandonment of the unit, and the employees' selection of Teamsters, permitted the Employer's recognition of it.

gaining unit was participating in the Teamsters picketing by October 28.

Colon became aware of the shift in employee loyalty and sentiment on October 23, when he observed the Teamsters activity at the plant and when an employee meeting he had scheduled for that evening was not attended by even a single employee. Colon spoke to the Teamsters organizers and sought to dissuade them from their activity, to no avail, by referring to a "no-raid" agreement he claimed existed between the two unions. On October 24, Teamsters filed a petition in the Regional Office in Case 29-RC-4376 supported by 73 authorization cards in a production and maintenance unit at that time consisting of 121 employees. For the reasons set forth above, these cards as well as many others proffered, were not received for the purpose of demonstrating majority status. However, there seems to be no doubt that a sufficient number of unit employees signed Teamsters authorization cards to support the aforesaid petition and therefore raised a real question concerning representation.¹⁶

Towards the latter part of October, Teamsters made a few requests for recognition which Polen fended off saying that he would first consult with his attorneys. A meeting was held on Saturday, November 4, at the plant, between Polen, his attorney, various Local 810 officials, and its attorney, starting about 9:30 a.m. Polen was tendered a recognition agreement for his signature which in essence provided for exclusive recognition of Local 810 in a production and maintenance unit and for immediate negotiations leading to a collective-bargaining agreement. It also recited that recognition was extended based upon objective considerations enumerated therein substantially as follows: (1) the cessation of picketing by IUE; (2) the picketing by a substantial number of employees for Local 810; (3) employee statements made to employer representatives stating a desire for Local 810; (4) petitions attached to the document signed by 124 employees revoking their desire for IUE representation; and (5) authorization cards signed by 118 of the 130 unit employees also submitted with the document.

Before signing the recognition agreement, Polen examined the authorization cards, satisfied himself there were no duplicates, and compared the signatures on about 10 cards chosen at random against company records. When this random sample proved reliable, he executed the recognition agreement. The two sides continued to meet until about 7 p.m. and negotiated a 3-year collective-bargaining agreement which was explained to a committee of eight employees waiting in an anteroom. The agreement was patterned after the expired IUE agreement with many of the provisions being incorporated without change. It did provide for annual wage increases of 50, 40, and 40 cents, additional holidays, and contributions to certain Teamsters health, welfare, and pension funds. On Monday, November 6, the employees returned to work

and on November 8 the first of these unfair labor practice charges was filed.

On November 21, Local 810 wrote to Signal advising "that as a result of a specific directive from Teamsters General President Frank E. Fitzsimmons, Local 810 hereby withdraws its demand to represent your production and maintenance employees and rescinds its collective-bargaining agreement dated November 4, 1978." Although the letter further requested the Employer to acknowledge the aforesaid recession by signing and returning the letter, this never was done. However, all dues which had been deducted through December, although none ever were transmitted to Local 810, were returned to the employees in January 1979. Further, the Employer never made contributions to any of the Local 810 funds. In many other respects the Employer did apply terms of the Local 810 contract; e.g., wages, holidays, etc. On November 28, the Regional Director for Region 29 approved Local 810's request filed on November 21 to withdraw its petition. There is no evidence to suggest that Teamsters sought to enforce or administer the contract or that it otherwise acted inconsistently with its letter of November 21.

It also is undisputed that after October 16 Signal ceased payments to the various IUE health, welfare, and pension funds which it had made under the expired contract, and that in January 1979 it instituted fully paid Blue Cross and Blue Shield medical coverage for its employees without notice to or bargaining with IUE or Teamsters. Further, in the summer of 1979, Signal met with attorney Bogen who had been retained by employees of Signal in January 1979,¹⁷ to resolve certain problems arising from claims made under these plans and further agreed to entertain proposals from him relative to improving the medical coverage. Attorney Bogen had written to Signal on January 10, 1979, in connection with the rights of employees pursuant to the agreement of November 4 between Teamsters and Signal. Among other things, Bogen objected to the checkoff of dues and the failure to abide by the terms of that agreement. He demanded a refund of dues, contributions to the Teamsters funds, and stated that a shop committee was prepared to administer the contract if Teamsters refused to correct its unilateral abrogation and rescission of said agreement. Attorney Rosenbluth replied for Signal that it would correct the dues-checkoff problem,¹⁸ and take under advisement the other claims pending Board determination of the conflicting union claims.¹⁹ To complete the factual picture, IUE wrote to Signal on January 16, 1979, also demanding an end to the dues checkoff in favor of the Teamsters and a resumption of payments to the IUE funds.

¹⁶ In view of my findings *infra* that IUE had not abandoned its interest in continued representation, in no event would cards be conclusive on the issue of selection of an exclusive bargaining agent even if cards signed by a majority of the employees were properly authenticated. *Midwest Piping and Supply Co., Inc.*, 63 NLRB 1060, 1070 (1945).

¹⁷ The names or number of these employees are not identified in the record.

¹⁸ As noted, all dues were returned whether or not an authorization had been given by an employee, a matter not pursued further in this case by any party.

¹⁹ The letter referred to a claim by yet a third union.

Conclusions Regarding the Allegations Arising from the Recognition of the Teamsters

The facts of this case require an analysis of the following questions: Did the Employer have objective considerations permitting withdrawal of recognition from IUE on November 4, and, if it did, could it also unilaterally change any conditions of employment? Should the Teamsters have been permitted to prove a card majority as of November 4, and, if so, would such fact have privileged the Employer's recognition of it on that date?

The law is firmly settled that, upon expiration of a collective-bargaining agreement, a union enjoys a rebuttable presumption of majority status which may be rebutted by evidence establishing that the union no longer enjoys such status. In addition, even if such loss of majority is not established, an employer may refuse to bargain upon a showing that, in good faith, it had a reasonably based doubt, grounded on objective considerations, that the union's majority continued.²⁰ Whether or not such doubt exists turns on an examination of the factors relied upon by the employer in a given case, and where only an incumbent union is involved the employer's burden is not easily satisfied by incantation, or resort to any simple or easy formula. Rather, its doubt must be based on clear, convincing, and cogent evidence. However, where another union has surfaced and asserts a claim for recognition that clearly is not unsupportable and lacking in substance, it is said that a real question concerning representation (QCR) exists which compels the employer to remain neutral by engaging in no conduct which would indicate a preference for either union. In such situation a so-called card majority is irrelevant in deciding which union, if any, is the statutory representative.²¹ Thus, where there has been a previously established collective-bargaining relationship and a rival union files a petition supported by an adequate administrative showing of interest, it long has been held that the employer may not bargain with either union until the question concerning representation has been settled.²²

The more difficult question is whether or not a withdrawal of recognition based only on a well-founded reasonable doubt carries with it the right to engage in unilateral changes of employment conditions. Although it appears that in a one-union situation such unilateral conduct does not violate the Act, it is unnecessary to reach that issue here. *Stoner Rubber Company, Inc.*, 123 NLRB 1440 (1959).²³ In a *Midwest Piping* situation therefore it would seem for greater reason that such conduct is permissible. But in *Turbodyne Corporation*, 226 NLRB 522 (1976), the Board, without comment, affirmed the Administrative Law Judge's holding that despite the exist-

ence of a QCR arising from a validly filed rival petition, an employer and incumbent union lawfully could temporarily extend their collective-bargaining agreement and consequently the employer violated Section 8(a)(5) of the Act when it failed to continue the terms of the expired agreement in effect and instead instituted unilateral changes. However, in *Upper Mississippi Towing Corporation, et al.*, 246 NLRB 262 (1979), a case also involving a claim by a rival union, the Board held that "it is clear that employers may validly raise the 'reasonable doubt of continued majority status' defense against refusal-to-bargain allegations which are premised on unilateral changes in terms or conditions of employment, where the objective considerations upon which the employer's doubt is based are known to the employer at the time of its unilateral changes" Thus, the continued vitality of the *Turbodyne Corp.*, holding seems most questionable and the present Board view, in a two-union situation, is more in line with the majority holding in *Stoner Rubber*, especially the views expressed by Chairman Leedom.²⁴ This view, it seems to me, better accommodates the rationale on which the *Midwest Piping* doctrine rests; i.e., to reject as unreliable the resolution of conflicting majority claims by any method other than through Board procedures. As observed by the Board in that case ". . . the extent of dual membership among the employees during periods of intense organizing activity is an important unknown factor affecting a determination of majority status" *Midwest Piping and Supply Co. Inc., supra* at 1070, fn. 13. Therefore, neither the incumbent nor the rival union is in a position to prove that it enjoys a majority in fact, and the employer's reliance on the QCR raised by the rival union, which forms the basis for the reasonably based doubt of the incumbent's majority status, becomes the practical equivalent of a showing that such union no longer enjoys majority status. Under these circumstances, no basis exists for supporting an argument that the incumbent union's presumed majority status would preclude unilateral conduct.²⁵

With the foregoing principles in mind we can consider their application to the facts of the instant case. All parties concede, as well they must, the applicability of *Midwest Piping* by virtue of the substantial claim for representation by the Teamsters. Initially, I find that the petition filed by the Teamsters on October 24, supported by an adequate administrative showing of interest, raised a real QCR. In addition, the Teamsters actively and openly solicited membership at the picket line; starting with October 24, Polen was aware that employees ceased picketing for IUE and thereafter picketed only for Teamsters;

²⁰ *Guerton Industries, Inc., Armor Mobile Homes Division*, 218 NLRB 658 (1975).

²¹ *Kay Jay Corporation d/b/a McKees Rocks Foodland*, 216 NLRB 968 (1975); *Midwest Piping, supra*.

²² *Shea Chemical Corporation*, 121 NLRB 1027 (1958).

²³ See also the discussion of that case in *Automated Business Systems, etc.*, 205 NLRB 532, 534-535 (1973), enforcement denied 497 F.2d 262 (6th Cir. 1974), in which the Board notes the split in the *Stoner Rubber* rationale between Chairman Leedom and Members Rodgers and Bean on this issue. The Board appears to have rejected the views of the latter two, thus adopting Chairman Leedom's view that unilateral changes are permitted to the same extent as withdrawal of recognition.

²⁴ In view of the General Counsel's express disclaimer of violation based upon the unilateral conduct (in light of my dismissal of the allegations relating to the October 20 events), this entire question might appear to be extraneous to the case. However, I consider the matter appropriate for consideration nonetheless because it was fully litigated and attorney Bogen, a charging party, did not join in the General Counsel's position. Rather, Bogen argued for a remedy which would cure the failure to make payments to either union's funds without regard to what violations might be found. Therefore, at the least his position encompasses the issues discussed above.

²⁵ If the holding in *Upper Mississippi Towing Corporation, supra*, is applicable in a one-union situation, which is suggested by the *Stoner Rubber* holding, then the issue no longer is open to question.

IUE made no request for negotiations after October 20; no representatives of IUE appeared at the plant after October 26; and on November 4 Polen was shown cards and petitions bearing signatures from an overwhelming majority of his employees (the genuineness of which he had no reason to doubt) choosing Teamsters and rejecting IUE. Accordingly, as of October 24, the presumption of majority status enjoyed by IUE up to that date was effectively rebutted by clear and convincing evidence insufficient for Signal to have formed a reasonable doubt of that status based upon objective considerations. Accordingly, when the Employer thereafter withdrew recognition from IUE and made unilateral changes in employees' terms and conditions of employment (benefits granted under the Teamsters contract, termination of IUE negotiated conditions including pension and welfare, and institution of Blue Cross and Blue Shield coverage), I find it did not violate Section 8(a)(1) and (5) of the Act.²⁶ In view of this conclusion it is unnecessary to consider Signal's further defense that such unilateral changes were privileged because an impasse had been reached in bargaining.

The General Counsel also alleges the unilateral changes as independently violating Section 8(a)(3) of the Act, but never clearly articulated the theory for such proposition.

At best, I surmise that the General Counsel believes it is derivative from the alleged unlawful assistance rendered Teamsters by virtue of the recognition accorded it. However, the General Counsel did not cite any authority in support of such premise nor did he allege or prove any independent basis for concluding that the unilateral changes were motivated by a desire to discourage membership in IUE or to encourage membership in Teamsters. Accordingly, I shall recommend dismissal of this allegation.

Signal's actions, however, in recognizing the Teamsters and executing a union-security contract with it, violated Section 8(a)(1), (2), and (3) under the well-established precedent of *Midwest Piping and Supply Co., Inc.*, *supra*. Teamsters defends on the ground that IUE abandoned the unit prior to November 4, and thus there was no rival claim by that union. Teamsters rely on the same facts that established its own rival claim as well as the purported card majority obtained by it and the petitions allegedly signed by a majority of employees disavowing allegiance to IUE. I find no merit to this defense. Taken together, all of the assertions add up to the very situation envisioned by *Midwest Piping* where, as recited above, the Board will not allow majority status to be privately determined. The alleged abandonment by the employees of IUE does not prove the reverse proposition and merely is another manifestation of possible dual membership. If IUE in fact had abandoned the employees that might be another matter. However, the evidence does not support such conclusion. The only facts bearing on

this issue are Colon's failure to appear at the plant after October 26, and IUE's failure to request further bargaining after October 20. Although IUE's behavior may have been attributable to the obvious shift in employee sentiment outwardly manifested at the picket line, or to any number of reasons, I do not consider it necessary to make a finding in this regard. For, in any event, there simply is not a shred of evidence that IUE, in the short time between the appearance of the Teamsters on October 23 and the grant of recognition on November 4 clearly and unmistakably notified either the Employer or the employees that it disclaimed interest in representing them further. Nor am I willing to infer such disclaimer or abandonment from the foregoing circumstances. Certainly, the filing of this charge on November 8, although after the event, demonstrated IUE's continued interest in the employees. Nor can it be faulted for not having objected sooner inasmuch as neither the Teamsters nor Signal invited IUE to attend their wedding.

The Teamsters also defends on the ground that numerous United States Courts of Appeals have rejected the *Midwest Piping* doctrine in cases of this kind and that it should have been allowed to prove its majority status through cards.²⁷ Notwithstanding the contrary view of the various circuit courts, however, the Board presently adheres to the view that application of *Midwest Piping* in cases such as this better protects the Section 7 rights of employees.²⁸ It goes without saying that I am required to follow the Board rule and, accordingly, the Teamsters legal argument is rejected.

In summary, it is my conclusion that Respondent Employer herein violated Section 8(a)(1) and (2) by its assistance to and recognition of Respondent Teamsters. Respondent Employer further violated Section 8(a)(1) and (3) by entering into a collective-bargaining agreement with the assisted union, which agreement contained union-security and dues-checkoff provisions. In a similar manner, Respondent Teamsters violated Section 8(b)(1)(A) and (2) of the Act by accepting such assistance and recognition from Respondent Employer and by entering into a contract containing union-security and dues-checkoff provisions. It also is my opinion that a remedial order is required in this case notwithstanding the action of the Teamsters in rescinding the aforesaid collective-bargaining agreement, which rescission the Employer has refused to acknowledge is binding on it; the fact that the agreement including the union-security and dues-checkoff provisions have not been enforced since January 1979; and the fact that all dues unlawfully collected have been refunded. Neither Respondent has unequivocally disavowed its illegal activities in a manner calculated to remove the lingering corrosive effects of their unfair labor practices on the Section 7 rights of the employees. The Teamsters for its part was less than wholehearted and unequivocal in its rescission action, the

²⁶ *Upper Mississippi Towing Corporation*, *supra*; *Stoner Rubber Company, Inc.*, *supra*. In *Upper Mississippi*, as here, the petition was withdrawn because of pressure from the parent union and not because of loss of employee support, a matter made known to the employer. Thus, the withdrawal of the petition in no way diminishes the validity of the Teamsters claim.

²⁷ See *American Can Company v. N.L.R.B.*, 535 F.2d 180 (2d Cir. 1976), and the cases listed therein. The Second Circuit, although having followed *Midwest Piping* in the past, concluded it was not applicable in the cited case before it and expressed no view whether it would continue to follow it, or whether or not the Board should, in light of the rejection of it by other circuits.

²⁸ See, e.g., *Kona Surf Hotel*, 201 NLRB 139 (1973).

Employer by not accepting it remains unrepentant, and neither Respondent has yet to advise the employees that their statutory rights were denied them.²⁹

However, I shall recommend dismissal of those portions of the complaint and consolidated complaint alleging unfair labor practice violations by the Employer with respect to its alleged failure to bargain in good-faith on October 20, 1978, and the alleged violations of Section 8(a)(2), (3), and (5) emanating from the unilateral changes in various terms and conditions of employment, including the failure to continue in existence the various IUE benefit plans and other terms of the expired contract, as well as the institution of new conditions of employment such as the Blue Cross-Blue Shield medical plan.

CONCLUSIONS OF LAW

1. Respondent Signal Transformer Co., Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent Local 810, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Charging Party Local 431, International Union of Electrical, Radio and Machine Workers, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

3. By recognizing Respondent Teamsters, by executing a collective-bargaining agreement with the Teamsters, and by maintaining in effect and enforcing the provisions of said contract, which contained union-security and dues-checkoff provisions, at a time when a question concerning the representation of its employees existed, Respondent Employer has rendered and is rendering unlawful assistance and support to the Teamsters and has interfered with, restrained, and coerced and is interfering with, restraining, and coercing its employees in the exercise of Section 7 rights in violation of Section 8(a)(1), (2), and (3) of the Act.

4. By accepting recognition from Respondent Employer and by entering into a collective-bargaining agreement containing union-security and dues-checkoff provisions with Respondent Employer at a time when a question concerning representation of Respondent Employer's employees existed, Respondent Teamsters restrained and coerced and is restraining and coercing employees in the exercise of rights guaranteed in Section 7 of the Act in violation of Section 8(b)(1)(A) and (2) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Except as set forth above, the General Counsel has not established by a preponderance of the credible evidence that Respondent Employer has violated the Act.

THE REMEDY

Having found that Respondents have engaged in certain unfair labor practices, it shall be recommended that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

²⁹ See, generally, *Plastic Film Products Corp.*, 238 NLRB 135 (1978).

Having found that Respondent Employer violated Section 8(a)(1), (2), and (3) of the Act by recognizing Respondent Teamsters and entering into a collective-bargaining agreement with it on November 4, 1978, containing union-security and dues-checkoff provisions, all during the pendency of a question concerning the representation of the employees covered thereby, I shall recommend that Respondent Employer be ordered to withdraw and withhold all recognition from Respondent Teamsters and to cease giving effect to the aforementioned agreement, or to any renewal, modification, or extension thereof, until such time as Respondent Teamsters shall have been certified by the Board as the exclusive representative of the employees in question.

I also have found that Respondent Teamsters accepted recognition and on November 4, 1978, entered into a collective-bargaining agreement containing union-security and dues-checkoff provisions with Respondent Employer at a time when there existed a question concerning representation of the employees covered thereby. By such conduct, Respondent Teamsters has restrained and coerced Respondent Employer's employees in the exercise of their right to freely select their own bargaining representative in violation of Section 8(b)(1)(A) and (2) of the Act. In order to dissipate the effect of Respondent Teamsters unfair labor practices, I shall recommend that Respondent Teamsters be ordered to cease maintaining or giving effect to the aforesaid recognition and collective-bargaining agreement with Respondent Employer or any renewal or extension thereof until such time as Respondent Teamsters shall have been certified by the Board as the exclusive representative of the employees in question.

Inasmuch as Respondents have ceased giving effect to the union-security and dues-checkoff provision of their agreement, and all dues collected thereunder have been returned to employees, I find it unnecessary to recommend any affirmative relief with respect to these matters.

Upon the foregoing findings of fact, conclusions of law, and entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER³⁰

A. Respondent Signal Transformer Co., Inc., Inwood, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Assisting or contributing support to Local 810, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or to any other labor organization, by recognizing such labor organization as the exclusive representative of any of its employees for the purpose of collective bargaining at a time when a question concerning representation exists.

³⁰ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Giving effect to or enforcing the collective-bargaining agreement executed with Respondent Teamsters on November 4, 1978, or to any modification, extension, renewal, or supplement thereto, unless and until Respondent Teamsters has been certified by the National Labor Relations Board as the exclusive bargaining representative of such employees; provided, however, that nothing herein shall require Respondent Employer to vary or abandon any existing term or condition of employment.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act:

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Withdraw and withhold all recognition from Local 810, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as a representative of its collective-bargaining agreement unless and until said labor organization has been duly certified by the National Labor Relations Board as the exclusive representative of such employees.

(b) Post at its plant in Inwood, Nassau County, New York, copies of the attached notice marked "Appendix A."³¹ Copies of said notice on forms provided by the Regional Director for Region 29, after being duly signed by Respondent Employer's representative, shall be posted by Respondent Employer immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by Respondent Employer to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Post at the same places and under the same conditions as set forth in (b), above, as they are forwarded by the Regional Director, copies of Respondent Teamsters notice marked "Appendix B."

(d) Mail signed copies of the attached notice marked "Appendix A" to the Regional Director for posting at Respondent Teamsters offices and meeting halls.

(e) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent Employer has taken to comply herewith.

³¹ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

B. Respondent Local 810, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Accepting exclusive recognition as representative of Respondent Employer's employees at Inwood, Nassau County, New York, at a time when a question concerning representation exists.

(b) Maintaining or giving effect to its contract of November 4, 1978, with Respondent Employer or to any modification, extension, renewal, or supplement thereto, unless or until it has been duly certified by the National Labor Relations Board as exclusive representative of such employees.

(c) In any like or related manner restraining or coercing Respondent Employer's employees at Inwood, Nassau County, New York, in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Post at its offices and meeting halls copies of the attached notice marked "Appendix B."³² Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by a Respondent Teamsters representative, shall be posted by Respondent Teamsters immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Teamsters to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Post at the same places and under the same conditions as set forth in (a) above, as they are forwarded by the Regional Director, copies of Respondent Employer's notice marked "Appendix A."

(c) Mail signed copies of the attached notice marked "Appendix B" to the Regional Director for posting at Respondent Employer's plant.

(d) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent Teamsters has taken to comply herewith.

IT IS ALSO RECOMMENDED that the consolidated complaint be dismissed insofar as it alleges violations of the Act not specifically found.

³² See fn. 31, *supra*.